

(2013) 02 AHC CK 0135

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 35363 of 2010

Swaraj Bhushan Tripathi

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 01-02-2013

Acts Referred:

Citation : (2013) 02 AHC CK 0135

Hon'ble Judges : Rajiv Sharma, J and Satyendra Singh Chauhan, J

Final Decision : Dismissed

Judgement

Satyendra Singh Chauhan, J.—Heard Sri M.D. Singh "Shekhar", Senior Advocate, assisted by Sri S.K. Mishra, appearing on behalf of the petitioner and learned Standing Counsel.

2. Through the instant writ petition under Article 226 of the Constitution of India, the petitioner challenges the enquiry report dated 11.12.2009 submitted by the Enquiry Officer, namely, Sri Ramesh Chandra Dhildiyal, Joint Secretary, Basic Education, Government of U.P., Lucknow (respondent No. 2), contained in Annexure No. 14 to the writ petition.

3. Shorn off unnecessary details the facts of the case are that the petitioner, who was working as District Basic Education Officer at Bahraich, was placed under suspension in contemplation of disciplinary proceedings vide order dated 24.7.2003 inter alia on the grounds that he offered appointment to the B.Ed. Degree holders as Assistant Teacher in the department of Basic Education. A chargesheet was served upon the petitioner on 21.8.2003. Thereafter, the enquiry was conducted against the petitioner and the Enquiry Officer had submitted his report on 19.6.2004. Subsequently, the petitioner had approached this Court by filing writ petition No. 1299 of 2006, challenging his suspension order dated 24.7.2003. A coordinate Bench of this Court, while disposing of the writ petition, directed to conclude the enquiry within two months, otherwise suspension order will be revoked.

4. According to the petitioner, neither the enquiry was concluded within the period prescribed by this Court nor the petitioner was paid subsistence allowance. However, vide order dated 16.1.2008, services of the petitioner were dismissed by the disciplinary authority. Feeling aggrieved, the petitioner approached this Court by filing writ petition No. 23432 of 2008, which was dismissed on the ground of availability of alternative remedy with a direction to the State Public Services Tribunal to decide the claim of the petitioner within a period of six months vide order dated 7.5.2008. Pursuant to the order dated 7.5.2008, the petitioner challenged the order of dismissal from service dated 16.1.2008 before the State Public Services Tribunal by filing Claim Petition No. 998 of 2008. The Tribunal, vide order dated 24.11.2008, after hearing the parties and perusing the records, allowed the claim petition with a direction for reinstatement of the petitioner in service with all consequential benefits. However, the Tribunal granted liberty to the State Government to hold fresh enquiry in accordance with Rules and observing the principles of natural justice.

5. Not being satisfied with the judgment and order dated 24.11.2008 of the Tribunal, the State Government assailed the judgment and order dated 24.11.2008 by filing writ petition No. 434 (S/B) of 2009. A coordinate Bench of this Court, vide order dated 18.3.2009, disposed of the writ petition by modifying the judgment and order dated 24.11.2008 passed by the Tribunal to the extent that the consequential benefits awarded by the Tribunal shall depend upon the outcome of the fresh inquiry, if any. Further it was provided that if any enquiry is initiated against the petitioner, it shall be concluded by the State within three months from the date of the order. Against the order dated 18.3.2009 of the High Court, the State has preferred Special Leave to Appeal No. 25485 of 2009. The Apex Court, vide judgment and order dated 1.10.2009, dismissed the special leave petition with the following directions :

"We see no reason to interfere in this S.L.P. particularly when the High Court has remitted the matter for de novo enquiry. However, since the period of three months for conducting de novo enquiry has since elapsed, we extend the time to complete the said enquiry within three months from today. In the circumstances, the contempt proceedings instituted by the delinquent shall remain suspended for three months."

6. After the above order dated 1.10.2009 passed by the Apex Court, the petitioner was attached to the office of Assistant Director of Education (Basic), Kanpur Region, Kanpur Nagar (respondent No.3) as a suspended employee and accordingly, the petitioner joined in the office of respondent No.3 on 4.11.2009. Thereafter, enquiry was initiated against the petitioner after serving a chargesheet afresh on 4.11.2009 and the officer, who had earlier submitted enquiry report i.e. Sri Ramesh Chandra Ghildiyal (respondent No.2) against the petitioner, was again appointed as Enquiry Officer. However, after joining the duties in the office of respondent No.3, the petitioner fell ill as he suffered from Viral Hepatitis and the petitioner got himself medically examined in T.B. Sapru

District Hospital, Allahabad and the Doctor advised him to take bed rest. In these circumstances, the petitioner submitted an application for leave on 14.11.2009 to the Enquiry Officer (respondent No.2), informing him that he will not be able to attend the enquiry proceedings as he is seriously ill. Subsequently, on 26.11.2009, the petitioner moved an application before the Assistant Director of Education (Basic), Kanpur Region, Kanpur Nagar for changing the Enquiry Officer but when nothing was done, the petitioner moved another application on 14.12.2009 for change of Enquiry Officer (respondent No.2).

7. According to the petitioner, prior to any order being passed on the aforesaid application for change of enquiry i.e. letter dated 26.11.2009, the Enquiry Officer proceeded with the enquiry ex parte and submitted the impugned ex parte enquiry report dated 11.12.2009 to the disciplinary authority. According to him, petitioner, after getting rid off his illness, reported his duties in the office of respondent No. 3 on 21.12.2009 and then, he came to know that the enquiry against him has already been concluded as the Enquiry Officer has submitted its report on 11.12.2009. Subsequently, vide letter dated 29.12.2009, the petitioner was informed that his application for change of Enquiry Officer has been rejected. Thereafter, the State Government directed the petitioner to submit representation within 15 days vide order dated 29.12.2009, which was served upon the petitioner on 19.1.2010. Hence the instant writ petition.

8. Sri M.D. Singh "Shekhar", Senior Advocate, appearing on behalf of the petitioner submits that respondent No.2/Enquiry Officer was biased towards the petitioner as in earlier enquiry against the petitioner, the respondent No.2 was also Enquiry Officer, who did not conduct fair enquiry and in predecided manner submitted enquiry report against the petitioner, which was quashed by this Court and as such, there was no occasion to appoint the respondent No.2 as Enquiry Officer against whom there was serious allegations levelled by the petitioner. For the said reasons, the petitioner moved an application for change of Enquiry Officer before the respondent No.1 on 26.11.2009, praying therein to appoint an other Enquiry Officer except the respondent No.2 but nothing was done and as such, the petitioner moved another application/reminder for change of enquiry officer on 14.12.2009 but again nothing was done. He submits that when the petitioner joined on 21.12.2009, then, he was informed that the Enquiry against the petitioner has already been concluded during his illness period and the impugned ex parte enquiry report was also submitted by the Enquiry Officer. Thus, the impugned enquiry report is an ex parte report, which was submitted by the respondent No.2/Enquiry Officer without taking into consideration the serious ailment and in total breach of the principles of natural justice.

9. Elaborating his submissions, learned Counsel for the petitioner has submitted that the Apex Court, vide order dated 1.10.2009 passed in Special Leave Petition No. 11880 of 2009, had directed that enquiry should be conducted against the petitioner within a period of three months from the date of passing of the judgment and order by the Apex Court but on 4.11.2009 i.e. after the period of

one month, a show cause notice was issued to the petitioner and second show cause notice was given to the petitioner on 19.12.2009, when the applications moved on behalf of the petitioner before the respondent No.1 for change of Enquiry Officer were pending and were decided on 29.12.2009 and during the pendency of the applications of the petitioner, enquiry was concluded and the Enquiry Officer has submitted impugned ex parte report.

10. Learned Counsel for the petitioner has contended that apart from the defects in the enquiry, the petitioner has been discriminated and was not treated fairly as on the same charges and allegations, four District Basic Education Officers were placed under suspension including the petitioner and during the pendency of enquiry, three District Basic Education Officers, namely, Sri Ramesh Singh, Sri K.C. Bharti and Sri T.N. Pachauri were reinstated in service except the petitioner. He submits that B.Ed. Degree holders, in whose favour petitioner offered appointment as Assistant Teacher, approached this Court and this Court has passed the order in favour of B.Ed. Degree holders. Finally, the matter went up to the Apex Court and the Apex Court uphold the judgment passed by this Court and presently, B.Ed. Degree holders are working as Assistant Teacher in the Basic Education Department.

11. Lastly, learned Counsel for the petitioner submits that on the date of joining i.e. 21.12.2009, the petitioner was also served a letter dated 21.12.2009, whereby he was served the copy of the orders dated 2.12.2009, 4.12.2009 and 7.12.2009. He submits that in the counter affidavit filed on behalf of the State, it has been alleged that despite the publication of notice in the daily newspaper on 7.12.2009, petitioner chooses not to appear before the Enquiry Officer but the fact is that a notice was published on 7.12.2009 in daily newspaper only for district Kanpur Nagar and not for other districts, therefore, when the petitioner was going under treatment in district Allahabad, there was no occasion to appear before the Enquiry Officer as the notice so published on 7.12.2009 did not come to the knowledge of the petitioner.

12. Refuting the allegations made by the learned Counsel for the petitioner, learned Standing Counsel has contended that due opportunity was afforded to the petitioner to defend himself and keeping in view all the materials available before the Enquiry Officer, enquiry report was submitted, which was accepted by the disciplinary authority, accordingly, the petitioner was punished, therefore, the impugned enquiry report does not suffer from any illegality, hence, no interference is called for in exercise of jurisdiction under Article 226 of the Constitution of India.

13. Clarifying the position, learned Standing Counsel pointed out that in compliance of the order passed by the Apex Court, the Enquiry Officer has provided an opportunity of oral hearing on 10.12.2009 vide letter dated 2.12.2009 and an information in this regard was also sent by the respondent No.3 vide letter dated 4.12.2009 and 7.12.2009 and for abundant precaution, a press notice was also published informing the petitioner about the date of

hearing on 7.12.2009 but despite this, the petitioner did not turn up on the date fixed for personal hearing on 10.12.2009 and as such, Enquiry Officer finding no way out has submitted Enquiry Report to the Government on 11.12.2009 and the Government, in its turn by following principles of natural justice, has provided the copy of the enquiry report vide letter dated 19.12.2009, by which the petitioner was asked to submit his explanation but the petitioner did not avail any benefit of so many opportunity given to the petitioner to defend his case.

14. The question now to be examined by us is as to whether enquiry was conducted with due observance of principles of natural justice and whether petitioner was treated fairly or not.

15. From perusal of the record, it appears that the petitioner moved an application on 26.11.2009 to the respondent No.1 for change of Enquiry Officer. This application was moved by the petitioner on account of the fact that the respondent No.2 was highly biased towards the petitioner. In earlier enquiry against the petitioner, the same officer was the Enquiry Officer, who submitted enquiry report against the petitioner, which was quashed by this Court. Therefore, it was not proper on the part of the State Government to appoint the respondent No.2 as Inquiry Officer against whom serious allegations were levelled by the petitioner. The petitioner had requested the respondent No.1 to appoint any other Enquiry Officer except the respondent No.2. When nothing was done, then, the petitioner moved another application on 14.12.2009 with the same request to the respondent No.1. It has not been disputed that the petitioner was ill and he gave information to the Enquiry Officer. It comes out from the record that the petitioner after getting rid off his illness, reported for his duties in the office of respondent No.3 on 21.12.2009, then, on the same day, i.e. 21.12.2009, the petitioner was served a letter of dated 21.12.2009, whereby he was served the copy of orders dated 2.12.2009, 4.12.2009 and 7.12.2009 and he also come to know that Enquiry Officer has submitted its ex parte report. It is an admitted fact that the petitioner gave applications for change of Inquiry Officer, which were pending before the State Government and the same were decided on 29.12.2009 i.e. after submission of the enquiry report. Thus, it is clear that the enquiry was conducted in haste manner.

16. We also find force in the submission of petitioner's Counsel that the petitioner has been subjected to hostile discrimination, which is evident from the fact that on the same charges and allegations, four District Basic Education Officers were placed under suspension including the petitioner and during pendency of enquiry, three District Basic Education Officers, namely, Sri Ramesh Singh, Sri K. C. Bharti and Sri A. N. Pachuri were reinstated in service. Now Sri Ramesh Singh, who was posted at district Gorakhpur and Basti, has now been posted as Senior Lecturer at DIET, Faizabad, Sri K. C. Bharti, who was placed at district Maharajganj has now been posted as Senior Lecturer/Officiating Principal at DIET, Sant Kabir Nagar and Sri A. N. Pachuri, who was posted at District Bulandshahr, who has died during pendency enquiry, had also been given

posting, but the petitioner, who was posted at district Bahraich, is still under suspension. This act on part of the authorities shows discriminatory and mala fide exercise of powers by the respondent authorities.

17. A Division Bench of this Court in the case of Parasu Ram Singh Vs. Secretary of Agriculture, U.P. Lucknow and others reported in [2008 (26) LCD 1522] has held as under:

"This Court has already held that after the charge sheet is given to a delinquent employee an oral enquiry is must, whether the employee requests for it or not. The record which has been produced before us reveals that after submission of reply to the charge sheet, no date or time was fixed by the Enquiry Officer for recording of evidence of the witnesses on behalf of the Department to prove the charges as also for the defence witnesses for holding the enquiry. We are of the view that the petitioner was not given proper opportunity of hearing and no oral enquiry as required by law was held."

18. A Division Bench of this Court in the case of Radhey Kant Khare Vs. U.P. Cooperative Sugar Factories Federation Ltd. reported in [2003 (21) LCD 610] has also held as under:

"8. After a charge sheet is given to the employee an oral enquiry is a must, whether the employee requests for it or not. Hence a notice should be issued to him indicating him the date, time and place of the enquiry. On that date the oral and documentary evidence against the employee should first be led in his presence vide A.C.C. Ltd. v. Their Workmen (1963) II LLJ 396 (SC). Ordinarily, if the employee is examined first it is illegal vide Anand Joshi v. MSFC 1991 LIC 1666 Bom., S.D. Sharma v. Trade Fair Authority of India 1985 (II) LLJ 193, Central Railway v. Raghubir Saran 1983 (II) LLJ 26. No doubt in certain exceptional cases the employee may be asked to lead evidence first, vide Firestone Tyre and Rubber Co. Ltd. v. Their Workmen AIR 1968 SC 236, but ordinarily the rule is that first the employer must adduce his evidence. The reason for this principle is that the charge sheeted employee should not only know the charges against him but should also know the evidence against him so that he can properly reply to the same. Where no witnesses were examined and no exhibit or record is made but straightaway the employee was asked to produce his evidence and documents in support of his case it is illegal vide P.C. Thomas v. Mutholi Cooperative Society Ltd. 1978 LIC 1428 Ker, and Meenglas Tea Estate v. Their Workmen AIR 1963 SC 1719."

19. In the facts of present case, there is no oral inquiry. The perusal of the inquiry report establishes that no witness was examined, therefore, the inquiry report cannot be sustained in view of the aforementioned factual and legal position. It is also important to mention that the authorities failed to consider the very vital fact that the petitioner was confined to bed and was being treated at Allahabad, whereas the notice was published in a newspaper having large circulation in Kanpur district and as such, it is quite possible that the petitioner

could not lay hand on the notice or to be aware about the notice in respect of inquiry.

20. Natural justice has a prime role to play in the matter where the justice has to be secured. Natural justice is another name for commonsense justice.

21. Rules of natural justice are not codified canons. But they are principles ingrained into the conscience of man. Natural justice is the administration of justice in a common sense/liberal way. Justice is based substantially on natural ideals and human values. The administration of justice is to be freed from the narrow and restricted considerations which are usually associated with a formulated law involving linguistic technicalities and grammatical niceties. It is the substance of justice which has to determine its form.

22. Concept of natural justice has undergone a great deal of change in recent years. Rules of natural justice are not rules embodied always expressly in a statute or in rules framed thereunder. They may be implied from the nature of the duty to be performed under a statute. What particular rule of natural justice should be implied and what its context should be in a given case must depend to a great extent on the fact and circumstances of that case, the framework of the statute under which the enquiry is held. The old distinction between a judicial act and an administrative act has withered away. Even an administrative order which involves civil consequences must be consistent with the rules of natural justice. The expression "civil rights but of civil liberties, material deprivations and nonpecuniary damages in its wide umbrella comes everything that affects a citizen in his civil life.

23. In *D.K. Yadav Vs. J.M.A. Industries*; (1993) 3 SCC 259 the Apex Court while laying emphasis on affording opportunity by the authority which has the power to take punitive or damaging action held that orders affecting the civil rights or resulting civil consequences would have to answer the requirement of Article 14. The Hon"ble Apex Court concluded as under:

"The procedure prescribed for depriving a person of livelihood would be liable to be tested on the anvil of Article 14. The procedure prescribed by a statute or statutory rule or rules or orders affecting the civil rights or result in civil consequences would have to answer the requirement of Article 14. Article 14 has a pervasive procedural potency and versatile quality, equalitarian in its soul and principles of natural justice are part of Article 14 and the procedure prescribed by law must be just, fair and reasonable, and not arbitrary, fanciful or oppressive."

24. At this juncture, it would be relevant to produce relevant portion of paragraph 34 of the judgment rendered in *State Bank of Patiala and others v. S.K.Sharma*, JT 1996(3) SC 722. Though this decision was given in a service matter but the Hon"ble Apex Court has dealt with the principles of natural justice and the result, if it is not followed:

"Where the enquiry is not governed by any rules/regulations/statutory provisions

and the only obligation is to observe the principles of natural justice or, for that matter, wherever such principles are held to be implied by the very nature and impact of the order/action the Court or the Tribunal should make a distinction between a total violation of natural justice (rule of audi alteram partem) and violation of a facet of the said rule, as explained in the body of the judgment. In other words, a distinction must be made between "no opportunity" and no adequate opportunity, i.e. between "no notice"/"no hearing" and "no fair hearing". (a) In the case of former, the order passed would undoubtedly be invalid (one may call it "void" or a nullity if one chooses to). In such cases, normally, liberty will be reserved for the Authority to take proceedings afresh according to law, i.e. in accordance with the said rule (audi alteram partem). (b) But in the latter case, the effect of violation (of a facet of the rule of audi alteram partem) has to be examined from the standpoint of prejudice, in other words, what the Court or Tribunal has to see is whether in the totality of the circumstances, the delinquent officer/employee did or did not have a fair hearing and the orders to be made shall depend upon the answer to the said query. (It is made clear that this principle (No.5) does not apply in the case of rule against bias, the test in which behalf are laid down elsewhere.)"

25. While applying the rule of audi alteram partem (the primary principle of natural justice) the Court/Tribunal/Authority must always bear in mind the ultimate and overriding objective underlying the said rule, viz., to ensure a fair hearing and to ensure that there is no failure of justice. It is this objective which should guide them in applying the rule to varying situations that arise before them.

26. When the application for change of the Inquiry Officer was preferred by the petitioner, against whom he has no faith, there was no occasion to proceed with the enquiry and keep the application pending which resulted in serious prejudice to the petitioner. It was the duty of the State Government to remove the doubts and apprehensions, which were in the mind of the petitioner, showing fair treatment to him, who had already suffered a lot and the mental agony was continuing. It is an admitted fact that on the application for change of inquiry, the order was passed after submission of inquiry report.

27. During the course of arguments, Sri M.D. Singh "Shekhar", Senior Advocate, appearing on behalf of the petitioner has informed that the respondent No.2/ Inquiry Officer has retired from service on attaining the age of superannuation and as such, he has no grievance against any person and therefore, interest of justice would suffice, if any officer is appointed as Inquiry Officer to conduct the inquiry.

28. Taking the holistic view of the matter and the fact that there should be fairness and transparency in the action of the State Authorities, we allow the writ petition and quash the impugned inquiry report dated 11.12.2009 submitted by Sri Ramesh Chandra Dhildiyal, Joint Secretary, Basic Education, Government of U.P., Lucknow/Enquiry Officer (respondent No. 2), contained in Annexure No. 14

to the writ petition. However, the State Government is directed to conduct de novo inquiry in respect of the same charges and complete the same within a period of one month, from the date of receipt of a certified copy of this order, after giving due opportunity of hearing and observance of procedure prescribed under law. On receipt of the Inquiry Report, the disciplinary authority shall pass appropriate order in accordance with law, within next one month.